

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## **Advice Memorandum**

**SAM**

DATE: November 18, 2004

TO : Alan Reichard, Regional Director  
Region 32

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Classical Stairways, Inc.  
Case 32-CA-21531-1

590-7575-2500  
590-7587

This Section 8(a)(5) withdrawal of recognition case in the construction industry was submitted for advice as to whether the Employer and Union established a Section 9(a) relationship based upon language in the parties' Memorandum Agreement, which states that the Employer had "satisfied itself that the Union represents a majority of its employees." We conclude that the Memorandum Agreement did not establish a Section 9(a) relationship because the language in the Memorandum Agreement did not satisfy the three-part test set forth in Central Illinois Construction.<sup>1</sup> Therefore, the Employer was free to terminate the Section 8(f) relationship, and the Region should dismiss the Section 8(a)(5) charge, absent withdrawal.

### **FACTS**

Classical Stairways Inc. (the Employer) is a California Corporation engaged in the business of manufacturing and installing wooden stairs and windows. In 2001, the Employer signed a "Memorandum Agreement" with Carpenters 46 Northern California Counties Conference Board (the Union) binding it to the Carpenter's Master Agreement through June 30, 2004. The Memorandum Agreement contained the following language:

The individual employer expressly acknowledges that it has satisfied itself that the Union represents a majority of its employees employed to perform bargaining unit work and that the Union is the collective bargaining representative of such employees. The individual employer specifically agrees that it is establishing or has established a collective bargaining relationship within the meaning of Section 9 of the National Labor Relations Act of 1947, as amended, by

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<sup>1</sup> 335 NLRB 717 (2001).

executing this Agreement and/or by the execution of previous Memorandum Agreement(s).

The Employer stated that at the time the parties signed the agreement, the Union did not show, nor did it offer to show, evidence of majority support. Further, the parties did not discuss the significance or meaning of the 9(a) language at the time the contract was signed, and no employees were members of the Union or supported the Union.<sup>2</sup> According to the Union, it did not obtain signed authorization cards or have any contact with the employees until after the contract was signed and did not show the Employer any evidence of majority support.<sup>3</sup>

On April 13, 2004,<sup>4</sup> the Employer notified the Union by letter that it wished to cancel its collective bargaining agreement with the Union upon its termination. On April 19, the Union, by letter, acknowledged receipt of the Employer's termination letter and requested a meeting with the Employer for the purpose of commencing collective bargaining for a new agreement. The letter also requested information the Union said was necessary in order for it to prepare for bargaining. The Employer did not respond to the Union's information request or its request to meet and, on May 24, the Union sent a follow-up letter requesting the information and available dates to meet. On May 26, the Employer sent its termination notice to the Union for a second time. By letter on June 1, the Union advised the Employer that it had a duty and obligation to provide the requested information and that if it failed or refused to provide the information, the Union would take legal action. By letter on June 8, the Employer told the Union that it failed to find relevant language in the parties' contract requiring it to participate in collective bargaining. Thereafter, the Union filed this charge.

#### **ACTION**

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<sup>2</sup> When the employees were later told they had to join the Union, several stated that they did not wish to become members and expressed hostility toward the Union.

<sup>3</sup> The Union provided several authorization cards dated and signed by employees approximately a week after the parties signed the contract. The Union's witness thought that the Employer might have obtained the cards. The Employer stated that after the contract was signed, he told his employees they would have to go down to the Union hall to sign up.

<sup>4</sup> All dates are in 2004 unless otherwise noted.

We conclude that the Memorandum Agreement did not establish a Section 9(a) relationship between the Employer and Union because the language in the Memorandum Agreement did not satisfy the three-part test set forth in Central Illinois Construction. Accordingly, the Employer was free to withdraw recognition from the Union upon the termination of the Section 8(f) agreement.

There is a significant difference between a union's representative status in the construction industry under Section 8(f) and under Section 9(a) of the Act. Under Section 8(f), a collective-bargaining agreement does not bar representation petitions and an employer may terminate the bargaining relationship upon expiration of the agreement.<sup>5</sup> Under Section 9(a), a collective-bargaining agreement bars representation petitions and an employer must continue to recognize and bargain with the union after the agreement expires, unless and until the union is shown to have lost majority support.<sup>6</sup>

In the construction industry, there is a rebuttable presumption that a bargaining relationship is a Section 8(f) relationship.<sup>7</sup> A party asserting a Section 9(a) relationship may rely upon appropriate contract language alone to establish it.<sup>8</sup> In Central Illinois Construction,<sup>9</sup>

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<sup>5</sup> See, e.g., Central Illinois Construction, 335 NLRB at 718.

<sup>6</sup> Id.

<sup>7</sup> John Deklewa & Sons, 282 NLRB 1375, 1385 n. 41 (1987), enf'd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

<sup>8</sup> Central Illinois Construction, 335 NLRB at 717. But see Nova Plumbing, Inc. v. NLRB, 330 F.3d 531, 536-538 (D.C. Cir. 2003), denying enf. of 336 NLRB 633 (2001) (contract language alone did not establish a Section 9(a) relationship where evidence showed unit employees resisted union representation).

<sup>9</sup> 335 NLRB at 719-720.

the Board held that an employer or union in the construction industry asserting a Section 9(a) relationship based on contract language alone must satisfy the three-part test established by the Tenth Circuit in NLRB v. Triple C Maintenance, Inc.<sup>10</sup> and NLRB v. Oklahoma Installation Co.<sup>11</sup> The three-part test requires language that unequivocally indicates (1) the union requested recognition as the majority or 9(a) representative of the unit employees, (2) the employer recognized the union as the majority or 9(a) bargaining representative, and (3) the employer's recognition was based on the union having shown, or having offered to show, evidence of its majority support.<sup>12</sup> The Board also stated that it would "continue to consider relevant extrinsic evidence" in cases where the contractual language was not "independently dispositive."<sup>13</sup>

Based on these principles, we conclude that the Memorandum Agreement did not establish a Section 9(a) relationship between the parties.

Assuming that the language in the Memorandum Agreement meets the first and second elements of the test set forth in Central Illinois, the language does not satisfy the third element of the test. The language fails to unequivocally state that the Union showed or offered to show evidence of its majority support. In NLRB v. Oklahoma Installation, whose three part test the Board adopted, the recognition clause stated the union "submitted" and that the Employer is satisfied that the Union represents a majority of employees. The court found the language was ambiguous and could have been interpreted as a mere assertion, without proof or an offer of proof, that the union made to the employer.<sup>14</sup> Here, the agreement does not even include a statement to the effect that the Union claims, asserts or has majority support of the employees. Clearly, the failure to include such a statement creates the same type of ambiguity as in NLRB v. Oklahoma Installation. Thus, the language fails to

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<sup>10</sup> 219 F.3d 1147, 1155 (10th Cir. 2000), enforcing 327 NLRB 42 (1998).

<sup>11</sup> 219 F.3d 1160, 1164 (10th Cir. 2000), denying enf. of 325 NLRB 741 (1998).

<sup>12</sup> See Central Illinois Construction, 335 NLRB at 719-720.

<sup>13</sup> Id. at 720, fn. 15.

<sup>14</sup> See NLRB v. Oklahoma Installation Co., 219 F.3d at 1165-66.

unequivocally indicate that the Union showed, or offered to show, evidence of its majority support.<sup>15</sup>

Because the language in the agreement is ambiguous and is not independently dispositive of whether a Section 9(a) relationship was created, consideration of relevant extrinsic evidence is appropriate here. For example, in Pontiac Ceiling & Partition Co., the Board found that a 9(a) relationship was created even though the recognition clause merely stated that the incumbent union "claim[ed]" majority support.<sup>16</sup> The evidence in that case showed that at contract execution, the incumbent union presented signed authorization cards from a majority of the employees, even though the multi-employer association's bargaining representatives did not review the cards.<sup>17</sup> However, unlike in Pontiac Ceiling, there is no extrinsic evidence here indicating that the Union presented, or offered to present, any evidence of majority support. In fact, the Union admitted that it did not offer proof of majority support to the employer. The Union further admitted that the authorization cards signed by the employees were done after the Employer signed the contract and the Union instructed the Employer to have the employees sign the authorization cards.

Absent extrinsic evidence to clarify the ambiguous language of the agreement here, the Union has failed to demonstrate that its relationship with the Employer was a 9(a) relationship. Thus, by providing timely notice of termination of both the Master Agreement and the Memorandum

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<sup>15</sup> 219 F.3d at 1162, 1165-66. See also NLRB v. Triple C Maintenance Co., 219 F.3d at 1155 (stating that to satisfy requirement that language demonstrate union proved, or offered to prove, it enjoyed majority support, recognition clause must "have the employer acknowledge the fact that majority status was shown") (emphasis added).

<sup>16</sup> 337 NLRB 120, 121 (2001).

<sup>17</sup> Id. at 121, 123.

Agreement, the Employer satisfied its obligation under Section 8(f) and was not required to continue to recognize and bargain with the Union. Accordingly, the charge should be dismissed, absent withdrawal.

B.J.K.